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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/643,168

08/18/2003

Glen S. Axelrod

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09/08/2008

GROSSMAN, TUCKER, PERREAULT & PFLEGER, PLLC

55 SOUTH COMMERICAL STREET

MANCHESTER, NH 03101

EXAMINER

SMITH, KIMBERLY S

ART UNIT

PAPER NUMBER

3644

MAIL DATE

DELIVERY MODE

09/08/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/643,168

**Applicant(s)**

AXELROD, GLEN S.

**Examiner**

Kimberly S. Smith

**Art Unit**

3644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 10 July 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1 and 6-17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 6-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/CDC)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_
- Paper No(s)/Mail Date \_\_\_\_\_

**DETAILED ACTION**

***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(c), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(c) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 07/10/08 has been entered.

***Response to Arguments***

2. Applicant's arguments filed 07/10/08 have been fully considered but they are not persuasive. The Applicant argues that the end section of the O'Rourke reference does not engage with the opening at 16 as it is located within the end piece. This argument is not found persuasive as it is viewed in the Applicant's figures 2 and 3 that the end section of the instant invention is also located within the end piece so as to align holes (28 and 30). As the edge of the body portion is inserted into the opening of the end piece, it is therefore "configured" to engage with the opening. The Applicant further argues that if there were a compression fit, there would be no need or room for the adhesive 19. This argument is not found persuasive. The Applicant has not provided any supportive evidence for the statement and as such, the statement is not found persuasive. The Examiner maintains that Figure 2 of O'Rourke clearly shows a frictional fit between shaft 18 at the opening 16 and as such, the end piece thereby compresses upon the end section.

3. With respect to the preamble transitional language "consisting essentially of" overcoming the O'Rourke reference as no adhesive is utilized or is necessary in the present invention, this is not found persuasive. The transitional phrase "consisting essentially of" limits the scope of a claim to the specified materials or steps "and those that do not materially affect the basic and novel characteristic(s)" of the claimed invention. *In re Herz*, 537 F.2d 549, 551-52, 190 USPQ 461, 463 (CCPA), M.P.E.P. 2111.03. Absent a clear indication in the specification or claims of what the basic and novel characteristics actually are, "consisting essentially of" will be construed as equivalent to "comprising". See, e.g., *PPG*, 156 F.3d at 1355, 48 USPQ2d at 1355. Further, the Applicant's specification lends to the novel feature being directed to no exposed edge thereby limiting damage to the chew toy. As such, the use of an adhesive would not affect the basic and novel characteristics of the invention.

4. With respect to the Applicant's arguments regarding the O'Rourke reference not showing the opening 16 having a diameter that is less than the diameter of the shaft portion 12, the Examiner maintains that Figure 2 of O'Rourke shows a friction fit between the shaft portion and end portion thereby disclosing an opening having a diameter less than the non-compressed diameter of the shaft. Further, the diameter size is directed to a method of forming the device. The device in the configured state includes the diameter of the shaft being compressed to less than the diameter of the opening (so as to create an integral object). The method of forming the device is not germane to the issue of patentability of the device itself. As the claim is directed to an animal chew toy and the animal chew toy is directed to the integral and configured toy, the diameter prior to insertion, while considered by the Examiner, has not been given patentable weight.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1, 6-15 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over O'Rourke, US Patent 5,174,243 in view of Kaplan, D453,242.

O'Rourke discloses an animal chew (10) comprising a body portion (12) having a rigid supporting core (i.e. provided by the interweaving of the individual body sections) and an end piece (14) having a hardness greater than the first hardness of the body portion, wherein the end piece protects the edge section of the body portion by completely overlying the edge section, wherein the end piece is configured to engage the body portion comprises an opening (at 16), wherein the opening has a diameter less than the diameter of the body portion (as is viewed in Figures 1 and 2), wherein the outer layer of the body portion comprises an elastomer, wherein the body portion comprises a core at least partially covered by the outer layer (as viewed in Figure 4), wherein the end piece includes a plurality of protrusions (i.e. the condyles at 14), wherein the body portion has a hardness on the shore A scale and the end pieces have a hardness on the Shore D scale. However, O'Rourke does not disclose a raised ridge section on the end piece. Kaplan teaches the use of a raised ridge section having conical protrusions attached to an end piece so as to provide an additional chewing surface for the animal. It would have been obvious to one having ordinary skill in the art to use the raised ridge section as taught by Kaplan

with the apparatus of O'Rourke so as to provide an additional chewing surface for the animal's enjoyment.

Regarding claims 7-9, 11 and 17, O'Rourke as modified by Kaplan discloses the invention substantially as claimed. However, O'Rourke as modified does not positively disclose the first and second end pieces are thermoplastic, the outer layer is natural rubber, the core is nylon or the entire device is elastomeric. However, it would have been obvious to one having ordinary skill in the art to use a thermoplastic inclusive of nylon as the end pieces, the core being formed of nylon, the outer layer being rubber and the entire device being elastomeric since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice and as the applicant has not stated that the use of nylon or the entire device being elastomeric is for any particular purpose or solves any stated problem not addressed by the prior art as these are known materials for the composition of chew toys. *In re Leshin*, 125 USPQ 416.

7. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over O'Rourke, US Patent 5,174,243 in view of Kaplan, US D453,242 as applied to claim 1 above, and further in view of Klaus et al., US Patent 6,676,481 (Klaus).

O'Rourke in view of Kaplan discloses the invention substantially as claimed including the body portion being fittingly inserted into the end piece. However, O'Rourke does not disclose the first and second end pieces and body portion including at least one cooperating hole for the insertion of a dowel to attach the end pieces to the body portion. Klaus teaches the use of a dowel inserted into two connecting portions of a toy for providing a secure attachment of the two pieces together. It would have been obvious to one having ordinary skill in the art at the

time the invention was made to use the corresponding hole and dowel to fasten the end pieces to the end portion of the body portion as taught by Klaus with the invention of O'Rourke as modified so as to provide a secure coupling between the two components.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kimberly S. Smith whose telephone number is (571)272-6909. The examiner can normally be reached on Monday-Thursday 10:00-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Mansen can be reached on 571-272-6608. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Kimberly S Smith/  
Primary Examiner, Art Unit 3644  
kss